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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON

8 PAULA HAGEMEYER and
9 BRUCE HAGEMEYER,

10 Plaintiffs,

11 v.

12 UNITED STATES OF AMERICA,

13 Defendant.
14

NO. CV-04-3061-RHW

**ORDER DENYING WITNESSES'
MOTIONS FOR PROTECTIVE
ORDER**

15 Before the Court are Motions to Shorten Time (Ct. Recs. 24 & 27) and
16 Motions for a Protective Order (Ct. Recs. 25 & 28) from non-party movants John
17 Newcom and Peter Soderquist. The motions were heard without oral argument.

18 **DISCUSSION**

19 This case arose from injuries Plaintiffs suffered as a result of the Thirtymile
20 Fire near Winthrop, Washington, in 2001. Plaintiffs are suing the federal
21 government for negligence in its handling of the fire. Plaintiffs seek to depose
22 witnesses John Newcom and Peter Soderquist in early February. Witnesses
23 Newcom and Soderquist seek protective orders quashing Plaintiffs' Notices of
24 Deposition or, in the alternative, limiting the scope of Plaintiffs' questioning
25 during the depositions pursuant to Federal Rule of Civil Procedure 26(c).

26 The witnesses claim, upon information and belief, that Plaintiffs seek
27 deposition testimony from them for the purpose of establishing culpable conduct
28 on the part of the witnesses and/or their employer, Defendant. The witnesses claim

1 that, concurrent with this civil proceeding, the United States Attorney's Office for
2 the Eastern District of Washington is actively pursuing a criminal investigation
3 into the deaths of four firefighters as a result of the Thirtymile Fire. Presumably,
4 the purpose of the criminal investigation is also to identify potentially culpable
5 conduct on the part of individuals involved in the Government's response to the
6 fire. In their response to the witnesses' motions, Plaintiffs contend that there is no
7 real and substantial danger of criminal prosecution.

8 The witnesses are concerned that the deposition testimony sought by
9 Plaintiffs may impact their Fifth Amendment privilege against self-incrimination
10 as a result of the concurrence of the deposition with the ongoing criminal
11 investigation. Although courts do have the power to stay discovery and/or limit its
12 scope under Federal Rule of Civil Procedure 26(c), cases cited by the witnesses as
13 authority supporting this proposition involve requests for stays and protective
14 orders by parties to the litigation, not witnesses. *See Wehling v. Columbia*
15 *Broadcasting Sys.*, 608 F.2d 1084, 1089 (5th Cir. 1979) (plaintiff filed request to
16 stay further discovery); *S.E.C. v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C.
17 Cir. 1980) (stating that a court may "stay civil proceedings, postpone civil
18 discovery, or impose protective orders and conditions" at the request of the
19 parties).

20 The Fifth Amendment privilege against self-incrimination is uniquely
21 compromised when a party to litigation must choose between asserting the
22 privilege and pursuing or defending his position in on-going litigation. *See*
23 *Wehling*, 608 F.2d at 1089 (finding a stay in proceedings was the appropriate
24 remedy instead of "requiring plaintiff to choose between his silence and his
25 lawsuit"). The choice between Scylla and Charybdis does not confront the
26 witnesses here; instead, they may simply assert their Fifth Amendment privilege
27 when they are asked questions they deem require self-incriminating answers. *See*
28 *Chavez v. Martinez*, 538 U.S. 760, 771-72 (2003) (explaining that a witness' Fifth

1 Amendment privilege against self-incrimination in a non-criminal case may be
2 asserted before commencement of criminal proceedings). If the parties wish to
3 compel the witnesses' testimony over this privilege, and Plaintiffs' response to the
4 witnesses' motion indicates they shall, they may file a motion to compel with the
5 Court. At that time, the Court may more accurately assess the extent of the
6 privilege and the incriminating character of the testimony sought.

7 Accordingly, **IT IS HEREBY ORDERED:**

8 1. Witness Newcom's Motion to Shorten Time for Consideration of Movant
9 Newcom's Motion for Protective Order Quashing Plaintiff's Notice of Deposition
10 (Ct. Rec. 24) is **GRANTED**.

11 2. Witness Newcom's Motion of Non-Party Movant John Newcom for a
12 Protective Order Quashing Plaintiffs' Notice of Deposition (Ct. Rec. 25) is
13 **DENIED**.

14 3. Witness Soderquist's Motion to Shorten Time for Consideration of
15 Movant Soderquist's Motion for Protective Order Quashing Plaintiffs' Notice of
16 Deposition (Ct. Rec. 27) is **GRANTED**.

17 4. Witness Soderquist's Motion of Non-Party Movant Peter Soderquist for a
18 Protective Order Quashing Plaintiffs' Notice of Deposition (Ct. Rec. 28) is
19 **DENIED**.

20 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
21 enter this order and to furnish copies to counsel.

22 **DATED** this 30th day of January, 2006.

23
24 s/Robert H. Whaley

25 ROBERT H. WHALEY
26 Chief United States District Judge

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